

# Accurate Outcomes in **APPRAISAL**



## The Importance of the Umpire's Subject Matter Expertise

by Karl A. Schulz\*

## Introduction

Appraisal is one of the most important current issues in Texas insurance law as a result of the Texas Supreme Court's opinion in *Universal Underwriters*.<sup>1</sup> The Court strongly endorsed appraisal and set forth strict conditions for its waiver.<sup>2</sup> Consequently, appraisal is likely to become more common, either as a result of the parties' agreement or a court order.<sup>3</sup> An emerging concern, therefore, is what happens next in many appraisals—a dispute over the selection of the umpire that leads to a court selecting the umpire. It is well-settled that the umpire must be fair and impartial.<sup>4</sup> This article traces a growing body of law that further requires subject matter expertise in the selection of the umpire.<sup>5</sup> Moreover, this article presents arguments that subject matter expertise will help ensure that appraisals reach the accurate outcome and, therefore, will preserve judicial resources by obviating litigation over the appraisal process and award.

## The Appraisal Clause

"Today, appraisal clauses are uniformly included in most forms of property insurance policies. Virtually every property insurance policy for both homeowners and corporations contains a provision specifying appraisal as a means of resolving disputes regarding the amount of loss for a covered claim."<sup>6</sup> Appraisal binds the parties to have the extent or amount of loss determined in a particular way.<sup>7</sup> A typical appraisal clause provides:

### Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed by any two will be binding.

Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we still retain our right to deny the claim.<sup>8</sup>

Because the umpire has the power to side with one appraiser or another to make a binding award, the selection of the umpire is very important to the litigants and from the standpoint of preserving judicial resources.<sup>9</sup>

Most courts would likely prefer the appraisers select the umpire because that selection reflects the parties' agreement based on circumstances of the case. The appraisers' agreed selection also lightens the burden on the court and it avoids even a question of conflict of interest in the court's selection of the umpire. However, where the parties cannot agree on an umpire, either party can ask a court to make the selection.

## Who Can Be An Umpire?

Although a typical appraisal clause states that the appraisers must be competent and impartial, it is often silent as to who can be an umpire.<sup>10</sup> In early 1900's, Texas courts emphasized the quasi-judicial role of the umpire, essentially valuing fairness and impartiality over subject matter expertise, if subject

matter expertise was analyzed at all.<sup>11</sup> Subsequently, about one hundred years passed with very little development in appraisal jurisprudence.<sup>12</sup> Since Hurricanes Rita and Ike, Texas appraisal jurisprudence has developed significantly, however, the narrower question of the umpire's qualifications to oversee an appraisal has not.<sup>13</sup> Consequently, courts today have a great deal of freedom in selecting an umpire.

Harris and Galveston Counties both provide a list of retired judges from which current state court judges can select an umpire.<sup>14</sup> Federal courts in Texas are also selecting retired judges to serve as umpires.<sup>15</sup> Of course, a court-selected umpire need not be a retired judge, and in some cases, they are not.<sup>16</sup> These umpires may or may not have expertise in the specific subject matter of the appraisal.

There are some good reasons to select umpires without regard for subject matter expertise. First, a typical appraisal clause

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is silent as to the umpire's qualifications. If the text is silent, then there is no reason to read in a requirement for subject matter expertise. In other words, if the insurer drafting the appraisal clause wants to require certain qualifications for the umpire, it should spell that out in the text. Even if the appraisal clause states that the umpire must be "competent," competence is different than subject matter expertise. Second, umpires confront new factual situations all the time and can resolve them without subject matter expertise. For example, a retired judge likely had numerous different kinds of cases come through his courtroom, but was nevertheless able to grasp them, and could apply that same experience as an umpire. Third, requiring subject matter expertise would likely reduce the number of potential umpires, leading to repeated re-use of umpires, which could delay resolution of appraisals, lower the quality of appraisals, and inhibit the development of new umpires.

Despite these types of concerns, there is a growing body of law requiring subject matter expertise in order to serve as an umpire. As Judge Lee Rosenthal of the Southern District of Texas recently explained, "[b]ecause appraisal proceedings have little structure imposed by the policy, the umpire's role of assuring fairness in the process is at least as important as subject-matter expertise."<sup>17</sup>

## The Umpire's Subject Matter Expertise Improves the Appraisal Process

In *Glenbrook Patiohome Owners Association v. Lexington Ins. Co.*, the insurance policy was silent as to who could be an umpire.<sup>18</sup> The parties selected appraisers but could not agree on an umpire, so they asked the court to make a selection.<sup>19</sup> Judge Rosenthal held:

The role of the umpire under the policy is to receive the appraisers' statements of the value of the property and the amount of loss. If they disagree, the decision agreed to by any two of the three will be binding.

The plaintiff submitted a list of proposed umpires. In response, the defendant urges that given the umpire's role in this case, the primary criterion for selection after impartiality should be substantive expertise in the areas of valuation and damage analysis.

The appraisers selected by the parties have technical, substantive expertise in relevant

areas. Although the umpire selected by this court *must be competent* to evaluate conflicting evidence and information on valuation on property damage, there is no contractual or case-law requirement for a specific license or professional certification in technical field. An umpire must combine competence in evaluating conflicting disputed evidence with expertise and experience in assuring a fair process. Because appraisal proceedings have little structure imposed by the policy, the umpire's role of assuring fairness of the process is at least as important as subject-matter expertise.<sup>20</sup>

Judge Rosenthal's analysis raises several important points. First, the court repeatedly emphasized that the umpire must be competent, without the appraisal clause specifically requiring competence.<sup>21</sup> In effect, the court took it as a given that the umpire must be competent. This is a departure from previous Texas courts that emphasized the umpire's fairness and impartiality over competence.

Judge Rosenthal subsequently enumerated what competence entails and what other qualities an umpire must have: (1) fairness, impartiality, and integrity; (2) ability to evaluate and weigh conflicting evidence, including technical evidence; (3) subject matter expertise; (4) significant subject matter experience; and (5) ability to provide service.<sup>22</sup> The opinion indicated that these qualities need not be formally recognized by a specific license or professional certification, however, this reasoning makes sense because in the analogous situation of expert witness qualification, a person may be qualified by knowledge, skill, experience, training, or education.<sup>23</sup> These five prongs should be helpful to future courts in evaluating a potential umpire's fitness for the case at hand.

The opinion also put fairness and subject matter expertise on equal footing in terms of importance.<sup>24</sup> The court based this holding on an observation that the policy imposes little structure on the appraisal process.<sup>25</sup> Lack of structure has been a source of praise and criticism of the appraisal process.<sup>26</sup> For example, the Texas Supreme Court observed that "[a]ppraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings."<sup>27</sup> The supreme court added that:

In most cases, appraisal can be structured in a way that decides the amount of loss without deciding any liability questions. As we already noted, when an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it. When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong. And when the parties disagree whether there has been any loss at all, nothing prevents the appraisers from finding "\$0" if that is how much damage they find.<sup>28</sup>

The Wisconsin Supreme Court similarly held that:

Appraisal also deserves a more deferential review because the appraisal process is a fair and efficient tool for resolving disputes. First and foremost, the process is fair to both parties. It allows each to appoint an appraiser of their own liking, with a neutral umpire as

the deciding vote. Appraisals also promote finality, are time and cost-efficient, and place a difficult factual question—the replacement value of an item—into the hands of those best-equipped to answer that question. As a form of alternative dispute resolution, the appraisal process is favored and encouraged. See generally, *State v. P.G. Miron Constr. Co.*, 181 Wis.2d 1045, 1055, 512 N.W.2d 499 (1994) ("It has been the policy of this state and this court to foster arbitration as an alternative to litigation. The advantage of this process lies in the avoidance of the formalities, delay, and expense of litigation.")<sup>29</sup>

However:

The lack of clear-cut appraisal rules or uniformity among jurisdictions, and sometimes even within a jurisdiction, creates serious concerns that the appraisal process does not provide procedural due process in the assessment of loss. The appraisal process calls for sound protocol. If the rules affecting outcomes are unpredictable, appraisal could deprive parties of their most basic and essential protections of due process and fundamental fairness.<sup>30</sup>

As the court in *Glenbrook* indicated, making the umpire's subject matter expertise equally as important as his or her fairness ensures the flexibility of the appraisal process while addressing concerns such as due process and fairness. Several other courts have elaborated on this idea. For example, in *St. Charles Parish Hosp. Dist. #1 v. United Fire and Cas. Co.*, the federal district court in Louisiana explained that:

It is axiomatic that the third appraiser/umpire must be impartial so that his decisions are based on the merits of the disputed valuation rather than the personal influence or identity of the parties. In this tri-partite scenario, the appointed umpire occupies the position analogous to a judge because the umpire presides over two non-neutral appraisers – non-neutral on in the sense that they were named by the parties. Impartiality and absence of bias in favor of or against either party imparts confidence in the appraisal process.

Beyond the requirement of impartiality, subject matter expertise and being knowledgeable about the issues in dispute are relevant to the appointment. In this regard, experience in damage analysis, estimating and/or appraisals weighs on the positive side. Individuals familiar with the practices and procedures customarily used in appraising structural damage or estimating repairs (as opposed to adjusting of claims) will promote both fairness and efficiency of the process.<sup>31</sup>

Similarly, the federal district court in Connecticut in *In re Travelers Indem. Co.* held that impartiality went hand-in-hand with specialized industry knowledge to ensure that the panel's decisions would be fair and based upon the merits of the dispute and not personal influence or the identity of the disputants.<sup>32</sup>

In sum, courts have recognized that a fair and impartial umpire with subject matter expertise is best prepared to control the appraisal and achieve the accurate outcome. In a way, this conclusion is a matter of common sense.<sup>33</sup> Fairness and

impartiality are obviously threshold requirements to serve as an umpire. However, because losses subject to appraisal come in nearly infinite variety— from residential hurricane damage<sup>34</sup> to car wreck damage<sup>35</sup> to destruction of a vintage wine collection<sup>36</sup>— the umpire must also have subject matter expertise in those areas in order to knowledgeably decide the unique issues of those cases. Otherwise, the umpire may not have a sound basis for his decisions.

### Umpires are Not Mediators

Umpires are not mediators and appraisal is not mediation. Umpires exercise independent judgment to side with one appraiser or the other when they submit their differences.<sup>37</sup> Unlike a mediator, an umpire does not govern the appraisal with the object that the parties will each compromise to reach common ground.<sup>38</sup> “Splitting the difference” or “splitting the baby,” which might be the outcome of a mediation, is generally not a valid appraisal award.<sup>39</sup>

Rather than building consensus within the big picture like a mediator, the umpire keeps the focus on the disputed differences and decides on them.<sup>40</sup> “The office of an umpire is to decide between the two arbitrators in case they disagree. If the object of the submission was to have the concurrence of the two

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arbitrators chosen by the parties, then the provision for an umpire was a useless formality.”<sup>41</sup> Appraisal also differs from mediation in that appraisal generally resolves differences between the appraisers regarding the value of the property or the amount of loss, which can involve consideration of causation issues, whereas mediation generally resolves the entire case.<sup>42</sup>

In order to be an umpire rather than a mediator, the umpire has to decide which appraiser is correct. Making an accurate decision as to which appraiser is correct requires subject matter expertise. For example, Judge Sim Lake of the Southern District of Texas ruled on a Motion to Appoint Umpire in *American Legion Harrisburg Post No. 472 v. Westport Ins. Co.*<sup>43</sup> Judge Lake explained his appointment of a professional engineer as umpire in that Hurricane Ike damage case.<sup>44</sup>

The plaintiff suggests a number of former state court judges who appear to be fair and might make good mediators in this type of case. But as the defendant points out, they have no apparent experience in appraising structural damage or estimating repair costs or in damage analysis. So I think the most appropriate person to appoint and the person who I will appoint is now David [Nicastro], who will be the umpire.<sup>45</sup>

Both mediators and umpires investigate the particular facts of a dispute. However, Judge Lake’s order recognized that, unlike a mediator, the umpire must do so in order to make a knowledgeable and accurate decision on which appraiser’s technical analysis is correct.

Umpires also differ from mediators in that an appraisal results in an award, which must be within the authority granted by the appraisal clause, in writing, clear, and itemized.<sup>46</sup> In other words, after making a knowledgeable and accurate decision on which the appraiser’s technical analysis is correct, the umpire must be able to properly and adequately

communicate that decision in the award. Balancing these concerns obviously requires subject matter expertise.

The implications here are important. If the umpire makes a compromise decision rather than an accurate one, he may create a bad faith case where one does not really exist. For example, an umpire may issue a compromise decision showing that the insurer failed to pay all or part of the loss. The insured could then turn around and use that failure to pay all or part of the loss as evidence of bad faith, arguing that the insurer failed to pay what a panel of independent experts decided was payable under the policy. This could be a powerful argument in a motion for summary judgment or in front of a jury. Therefore, it is imperative that the umpire reach the accurate outcome in order to avoid artificially and incorrectly providing support to bad faith liability where it otherwise does not exist.

### The Umpire’s Subject Matter Expertise Counters Incompetent, Partial Appraisers

As mentioned, a typical appraisal clause requires that the party select a competent and impartial appraiser.<sup>47</sup> Parties, however, may violate this contractual provision and select an appraiser that reliably shares their side’s views.<sup>48</sup> At a minimum, this repeat business suggests that the appraiser will not be impartial

because he has already enjoyed a stream of income from that side’s law firm and he will want to continue that stream of income. At worst, the repeat business suggests that the appraiser is little more than

a stooge, cloaking the law firm’s arguments and tactics in the disguise of an appraisal. A related problem with selecting the same appraiser over and over again is the matter of timing. Appraisal can be a quick process, but when an appraiser is selected to work on dozens or even hundreds of cases, it is physically impossibility to visit a site, analyze information, write a report, and interact with the other appraiser and umpire in a timely fashion on all those cases. This may slow down the appraisal process and thus defeat one of its primary advantages while artificially creating an argument against appraisal that it is a slow process.

An umpire with subject matter expertise is especially important in such cases. The umpire must be able to see through incompetence and partiality, moving the appraisal along and accurately evaluating findings that may be artificially inflated or deflated. In other words, to accurately decide between partial appraisers, the umpire has to have as good or better knowledge of the subject than the partial appraisers. Otherwise, he is at their mercy.

### The Umpire’s Subject Matter Expertise Helps Control Costs

Texas courts have long recognized that appraisal provides a comparatively inexpensive alternative to litigation.<sup>49</sup> At the same time, courts are struggling with limited or dwindling resources.<sup>50</sup> This makes appraisal’s cost-saving function even more important. Texas courts have tried to preserve the appraisal’s cost-saving function by discouraging litigation regarding the scope of appraisal, waiver of appraisal, and even appraisal generally.<sup>51</sup> There remains, however, the potential for litigation about the qualifications of the umpire, the propriety of the umpire’s award, the accuracy of the umpire’s award, and a myriad of those potential issues surrounding the umpire phase of the appraisal process.<sup>52</sup> That litigation has the potential to be expensive and therefore defeat one of the main principles of the appraisal process.

For example, umpires’ awards are sometimes challenged on the ground that the umpire exceeded his authority by deciding

issues where the appraisers did not differ.<sup>53</sup> In other cases, the umpire's award is challenged on the ground that it was not properly valued.<sup>54</sup> In still other cases, the umpire's award is challenged on the ground that the umpire failed to properly consider the conclusions of a party's appraiser, or because the party felt the award was simply unjust.<sup>55</sup>

Texas courts have held that an appraisal award pursuant to an insurance policy is binding and enforceable unless the insured proves that the award was unauthorized or the result of fraud, accident, or mistake.<sup>56</sup> In other words, the appraisal award is the end result of the appraisal process, and where the award is somehow tainted, the appraisal process is wasted. That makes the award, which is the responsibility of the umpire, of paramount importance and a key point where the appraisal process can be improved.

Simply put, an umpire with subject matter expertise is better positioned to have the confidence and knowledge necessary to control the appraisal process, maintain its integrity, and decide the issues where the appraisers differ.<sup>57</sup> This in turn makes the appraisal process more efficient and accurate, which should obviate or reduce challenges to appraisal awards and help control costs.<sup>58</sup>

## Conclusion

Appraisal clauses are here to stay. The focus, therefore, should be on improving the appraisal process by making the outcome more efficient and accurate. A crucial element of this improvement is the appointment of umpires with subject matter expertise. Establishing and applying standards to evaluate subject matter expertise is the next step, which will benefit insureds, insurers and judicial economy.

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1 In re Universal Underwriters, 345 S.W. 3d 404 (Tex. 2011). The Texas Supreme Court is considering two petitions for writ of mandamus concerning whether litigation should be abated during appraisal, all stemming from Footnote 5 in *Universal Underwriters* which stated that "proceedings need not be abated while the appraisal goes forward." See John Council, *Abate or Litigate?*, TEXAS LAWYER, November 7, 2011 at p. 1. Without abatement, however, a party could run up the costs of litigation during appraisal and defeat the time- and cost-saving function of appraisal. This represents a great potential for waste because "if the appraisal determine[s] that the full value was what the insurer offered, there is no breach of contract." *Universal Underwriters*, 45 S.W. 3d at 412; see also *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005) (holding that if there is no breach of contract, extracontractual claims do not survive). A demand for appraisal is in some ways akin to a plea to the jurisdiction. As with a plea to the jurisdiction, the appraisal should be resolved first when it is demanded, in order to avoid needless expenditures. See *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 (Tex. 2007).

2 See *id.*

3 See, e.g., *Dike v. Valley Forge Ins. Co.*, 2011 U.S. Dist. LEXIS 67175 (S.D. Tex. 2011); *Butler v. Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 59914 (S.D. Tex. 2011); *EDM Office Servs. v. Hartford Lloyds Ins. Co.*, 2011 U.S. Dist. LEXIS 71209 (S.D. Tex. 2011); *James v. Prop. and Cas. Ins. Co. of Hartford*, 2011 U.S. Dist. LEXIS 103047 (S.D. Tex. 2011); In re Certain

Underwriters at Lloyds, 2011 Tex. App. LEXIS 8151 (Tex. App.—Waco 2011, no pet.).

4 See 68F-168f APPLEMAN ON INSURANCE §3928 (stating that "An umpire selected to arbitrate a loss should be disinterested, unprejudiced, honest, and competent."); Timothy P. Law and Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. 291, (2006) (stating that, "At a minimum, the umpire must be fair and impartial."). An umpire's fairness and impartiality might reasonably be questioned, thereby disqualifying the umpire from selection, when the umpire has close ties to the plaintiff's or defense's bar through employment history, campaign contributions, family ties, repeated nomination for selection by one side, or otherwise. See *id.*

5 There is a great deal of modern jurisprudence and legal scholarship specifically regarding the qualifications of appraisers, or regarding the qualifications of appraisers grouped together with a discussion of qualifications of umpires, but evidently much less so specifically regarding the qualifications of umpires. Compare *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143 (Tex. App.—Houston [1st. Dist.] 2002, no pet.) (analyzing appraisers' qualifications); Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 Conn. Ins. L.J. at 308-18 (analyzing qualifications of appraisers and umpires together); *The Waning Wisdom of Appraisal?* Robert H. Belt, Jr., Moderator, Critical Issues for Senior Insurance Executives and In-house Counsel Jointly Sponsored by PLRB; LIRB & FDDC, Oct. 23, 2006, Chicago, Ill (same) - Paper presented at Chicago conference (same), with 6F-168f Appleman on Insurance §3298 – QUALIFICATIONS AND APPOINTMENT OF UMPIRE (leading insurance treatise citing authorities that are generally a century or more old).

6 *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888-89 (Tex. 2009).

7 In re Allstate Cnty. Mut. Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002) (citing *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)).

8 ISO Building and Personal Property Coverage Form CP 00 10 04 02.

9 See Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 319 ("The selection of an umpire is perhaps the most important aspect of the appraisal process.").

10 See ISO Form; Texas Homeowners Policy – Form B; but see *Providence Lloyds Ins. Co. v. Crystal City Indep. School Dist.*, 877 S.W.2d 872, 874 (Tex. App.—San Antonio 1994, no pet.) (insurance policy stated that umpire must be competent and disinterested); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1059 (5th Cir. 1990). Even for policies that do use the word "competent," that term is generally not defined, leaving courts to interpret the word on an ad hoc basis. See, e.g., *Brothers v. Generali U.S. Branch*, 1997 U.S. Dist. LEXIS 14158, \*9-\*10 (N.D. Ga. 1997); *Citizens Prop. Ins. Co. v. M.A. & F.H. Prop.*, 948 So.2d 1017, 1020 (Fla. Dist. Ct. App. 2007). The word "competent" is also broad and vague. A major insurance treatise analyzing umpires' qualifications generally concluded that the umpires must be competent, without really exploring what competency entails. See 6F-168f Appleman on Insurance §3298 – QUALIFICATIONS AND APPOINTMENT OF UMPIRE. Some states have created a statutory scheme to govern the appointment of umpires. Law & Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 319.

11 See *Delaware Underwriters v. Brock*, 211 S.W. 779, 780 (Tex. 1919); *Pennsylvania Fire Ins. Co. v. W.T. Waggoner Estate*, 39 S.W.2d 593, 594-95 (Tex. Comm'n App. 1931, no writ); *Home Ins. Co. v. Walter*, 230 S.W. 723, 723-24 (Tex. Civ. App.—Dallas

- 1921, no writ); *New York Underwriters v. Shanks*, 78 S.W.2d 1026, 1028-30 (Tex. Civ. App.—Galveston 1935, no writ); *Atlas Const. Co. v. Indiana Ins. Co.*, 309 N.E.2d 810, 816 (Ct. App. Ind. 1974, no writ); *Mason v. Fire Assoc. of Philadelphia*, 122 N.W. 423, 426-27 (S.D. 1909) *Fowble v. Phoenix Ins. Co.*, 81 S.W. 485, 486 (Mo. Ct. App. 1904).
- 12 *Universal Underwriters*, 345 S.W. 3d at 407; *Johnson*, 290 S.W.3d at 888-89.
- 13 See generally *id.*; *In re Slavonic Mut. Fire. Ins. Ass'n*, 308 S.W.3d 556 (Tex. App.—Houston [14th Dist.] 2010, no pet.); see also *Johnson*, 290 S.W.3d at 890 (citing without comment an amicus brief that concluded “Umpires are often lawyers or mediators with no particular experience or expertise in property insurance coverage or claims.”).
- 14 Durrett Law Firm Newsletter (on file with author).
- 15 See, e.g., *Allstate Tex. Lloyds v. Shah*, 2009 U.S. Dist. LEXIS 32144, \*1-\*2 (E.D. Tex. 2009).
- 16 See, e.g., *Glenbrook* order (lawyer); *Judge Lake* Order (engineer); *Brothers*, 1997 U.S. Dist. LEXIS at \*10 (certified public accountant); *Emplrs Ins. Co. v. Certain Underwriters at Lloyds of London*, 2009 U.S. Dist. LEXIS 89945, \*18 (W.D. Wis. 2009) (lawyer); *Citrin v. Erikson*, 918 F. Supp. 792, 799 (S.D.N.Y. 1996) (lawyer).
- 17 *Glenbrook Patio Home Owners Ass'n v. Lexington Ins. Co.*, No. H-10-2929 (S.D. Tex. July 28, 2011) (mem. op.).
- 18 *Id.*
- 19 *Id.*
- 20 *Id.* (emphasis added).
- 21 *Id.*
- 22 *Id.*
- 23 See *E.I. Du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995).
- 24 See *Glenbrook*, No. H-10-2929.
- 25 *Id.*
- 26 See *Johnson*, 290 S.W.3d at 893-894; *Universal Underwriters*, 345 S.W. 3d at 407; Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 304-308.
- 27 *Johnson*, 290 S.W.3d at 894.
- 28 *Id.*
- 29 *Farmers Auto Ins. Ass'n v. Union Pac. Ry.*, 768 N.W.2d 596, 607 (Wis. 2009).
- 30 Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 308-09.
- 31 *St. Charles Parish Hosp. Dist. #1 v. United Fire and Cas. Co.*, 2008 U.S. Dist. LEXIS 34421, \*5-\*6 (E.D. La. 2008).
- 32 *In re Travelers Indem. Co.*, 2004 U.S. Dist. LEXIS 30074, \*11 (D. Conn. 2004).
- 33 A clear advantage of this approach is that it will be readily understood and accepted by the average policyholder. In the popular *Dummies* series of do-it-yourself books for laymen, the author of *Insurance for Dummies* concluded that “[f]or most property valuation disputes, you don’t need an elaborate group of three solemn judges. You just need a fair, unbiased, and disinterested person with excellent knowledge regarding the subject of the dispute— someone who both parties are comfortable with— to act as the umpire.” Jack Hungelmann, *Insurance for Dummies*, 95 (2009). There is also a sports analogy applicable here. Umpires can be found in baseball, football, and tennis. Sports fans expect (or hope) the umpires are fair and impartial, but no one would expect to see a home plate umpire wearing his mask working as a chair umpire at Wimbledon.
- 34 *Dike*, 2011 U.S. Dist. LEXIS at \*21-\*22.
- 35 *Johnson*, 290 S.W.3d at 889.
- 36 *Vintage Wine Policy*, <http://insureyourwine.com/pdf/VintageWine%20PolicyForm.pdf>.
- 37 Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 321; *Crystal City*, 877 S.W.2d at 877; *White v. State Farm Fire & Cas. Co.*, 2011 Mich. App. LEXIS 1419, \*14 (Mich. Ct. App.).
- 38 See Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 294; Joe Brennan, *Insurance Appraisal Process - A Policyholder's Best Chance to Resolve an Insurance Claim Dispute!*, Ezine Articles, June 15, 2009, <http://ezinearticles.com/?Insurance-Appraisal-Process---A-Policyholders-Best-Chance-to-Resolve-an-Insurance-Claim-Dispute!&id=2480355>.
- 39 See Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 321.
- 40 See *Crystal City*, 877 S.W.2d at 877.
- 41 *Twait v. Farmers Mut. Hail Ins. Co.*, 91 N.W.2d 575, 578 (Iowa 1958).
- 42 Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 298; *Johnson*, 290 S.W.3d at 893.
- 43 *American Legion Harrisburg Post No. 472 v. Westport Ins. Co.*, No. 10-2770 (S.D. Tex. 2008) (order on initial conference dated April 15, 2008 on file with author).
- 44 *Id.*
- 45 *Id.*
- 46 Law and Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 321; *Crystal City*, 877 S.W.2d at 878; *Fisch v. Transcont'l Ins. Co.*, 356 S.W.2d 186, 189 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.); *JM Walker LLC v. Acadia Ins. Co.*, 356 Fed. Appx. 744, 746 (5th Cir. 2009).
- 47 See sample appraisal clause, *supra* note 8.
- 48 See Law & Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. at 318. Failure to comply with this contractual provision, such as by selecting the same appraiser over and over again, opens the party up to a motion to strike the appraiser or other relief.
- 49 *Fire Ass'n of Philadelphia v. Ballard*, 112 S.W.2d 532, 534 (Tex. Civ. App.—Waco 1938, no writ); *Johnson*, 290 S.W.3d at 894.
- 50 *The Feeblest Branch*, *ECONOMIST*, Oct. 1, 2011 at 31.
- 51 *Johnson*, 290 S.W.3d at 894; *Universal Underwriters*, 345 S.W. 3d at 412; *James*, 2011 U.S. Dist. LEXIS at \*1-\*2.
- 52 See, e.g., *Crystal City*, 877 S.W.2d at 877; *JM Walker*, 356 Fed. Appx. at 746; *New York Underwriters' Ins. Co. v. Shanks*, 78 S.W.2d 1026, 1029 (Tex. Civ. App.—Galveston 1935, no writ); *Evanston Ins. Co. v. Cogswell Props.*, 730 F. Supp. 2d 748, 752 (W.D. Mich. 2010).
- 53 See *Crystal City*, 877 S.W.2d at 876.
- 54 See *id.*; *Cogswell*, 730 F. Supp. 2d at 752; *Atlas*, 309 N.E.2d at 814.
- 55 See, e.g., *Hozlock v. Donegal Cos.*, 745 A.2d 1261, 1266 (Pa. Super. Ct., 2000); *Gouin v. Northwestern Nat'l Ins. Co.*, 259 P. 387, 390 (Wash. 1927).
- 56 See, e.g., *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied).
- 57 See *Crystal City*, 877 S.W.2d at 877; *St. Charles*, 2008 U.S. Dist. LEXIS at \*5; *Travelers*, 2004 U.S. Dist. LEXIS at \*9-\*10.
- 58 See *id.*; see also *Gouin*, 259 P. at 390; *Young v. Aetna Ins. Co.*, 64 A. 584, 586 (Me. 1906); *Kuehn v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 74691, \*18-\*19 (S.D. Miss. 2009).